

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **CHARLES ROSE,**)
4)
5 **Appellant,**) **PCHB No. 92-63**
6)
7 **v.**)
8)
9 **PUGET SOUND AIR**) **FINAL FINDINGS OF FACT,**
10 **POLLUTION CONTROL**) **CONCLUSIONS OF LAW**
11 **AGENCY,**) **AND ORDER**
12)
13 **Respondent.**)
14)
15 _____)

16 This matter came on for hearing before the Washington State Pollution Control
17 Hearings Board in Lacey, Washington, on December 11, 1992. Annette S. McGee presided,
18 and Board Chairman Harold S. Zimmerman and Attorney Board Member Robert V. Jensen
19 were in attendance.

20 It is the appeal of a one-hundred dollar (\$100) Civil Penalty issued to Charles Rose by
21 the Puget Sound Air Pollution Control Agency (PSAPCA) for an alleged wood smoke
22 violation.

23 Appearances were as follows:

24 Appellant Charles Rose, appeared pro se.

25 Respondent PSAPCA was represented by Keith D. McGoffin, Attorney at Law

26 Lenore E. Elliott, Certified Shorthand Reporter of Gene Barker & Associates, Inc. of
27 Olympia, WA, recorded the proceedings.

 Witnesses were sworn and testified. Exhibits entered and were examined. From the
 testimony heard and exhibits examined, the Board makes these

28 **FINAL FINDINGS OF FACT,**
29 **CONCLUSIONS OF LAW AND ORDER**
30 **PCHB No. 92-63**

1
2 **FINDINGS OF FACT**

3 **I**

4 This case arises from the PSAPCA's one hundred dollar (\$100) Notice and Order of
5 Civil Penalty No. 7578 issued to Charles Rose on March 18, 1992, for the alleged violation of
6 Section 13 03(a) of the agency's Regulation 1.

7 **II**

8 The alleged wood smoke violation, on a day that the PSAPCA had banned burning,
9 was on the twentieth day of January, 1992, at 22128 - 104th Place, South East, City of Kent,
10 County of King, State of Washington.

11 **III**

12 Appellant Charles Rose timely filed the appeal on April 1, 1992, which became
13 PCHB 92-63.

14 **IV**

15 Richard J Pogers, an air pollution inspector for PSAPCA was in his car when he was
16 notified by PSAPCA radio dispatch that second stage of impaired air quality was in effect. All
17 normal inspection activities were suspended pending further notification, and all inspectors
18 were to "canvass" their designated areas for wood smoke violations.

19 **V**

20 Inspector Pogers observed smoking chimneys from two residences at a dead end street
21 of 104th Place SE.

22 **VI**

23 Inspector Pogers documented smoke being emitted from 22128 104th Place SE of such
24 opacity to obscure an observer's view to a degree equal to or greater than twenty (20) percent.
25 He then proceeded to take pictures of the residence with the smoking chimney and identified
26 himself to a woman who came out of the house at the above address. He explained that there

27 **FINAL FINDINGS OF FACT,**
CONCLUSIONS OF LAW AND ORDER
PCHB No 92-63

1 was a stage two alert in effect and that her smoking chimney was in violation. He further
2 attempted to provide her with a copy of PSAPCA's handout and explained that if the burning
3 was her only source of heat, she was still required to burn clean. This took about ten (10)
4 minutes. Pogers testified that she refused the handout, and he drove away from the residence
5 while she was yelling at him.

6 VIII

7 The inspector did not get the name of the lady he talked to or the residents occupying
8 the house in question. Not knowing the name of the occupants, another PSAPCA employee
9 verified through the King County Assessor's Office that the taxpayer on said property was
10 Charles and Judith Rose, residing at 22141 104th Place SE, Kent, WA. Pogers later went to
11 the assessor's office to obtain papers of the ownership.

12 IX

13 Notice of Violation No. 13-0011499 was issued to Charles Rose, 22128 104th Place
14 SE, Kent, WA, on January 29, 1992.

15 The mailman delivered the Notice to Charles Rose at 22141 104th Place SE, because he
16 knew that was where Rose lived.

17 X

18 The agency then mailed by certified mail "Notice and Order of Civil Penalty" in the
19 amount of one-hundred (\$100) dollars to Rose, using both addresses.

20 Penny Wold signed for the certified mail at 22128 104th Place SE and Judith E. Rose
21 signed at 22141 104th Place SE.

22 XI

23 Charles and Judith Rose own both residences. However, the Roses live at 22141 104th
24 Place SE and lease the residence at 22128 104th Place SE to Thomas G. Mills.

25 The lease contract is dated September 28, 1988.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 92-63

1
2 XII

3 Rose contends that he is not responsible for the action of a renter under the terms of the
4 Landlord & Tenant Act, and that he should not be liable for the penalty, because he does not
5 live at the residence where the alleged violation occurred, and the residence is under the
6 control of the lessee.

7 XIII

8 Rose called PSAPCA and talked to Rick D Hess, Woodsmoke Inspector, who at the
9 time of the incident was in charge of sending out the Notice of Violation.

10 Rose agrees that he is the owner of the house in question, but contends that PSAPCA
11 should have found out who was living at the residence and who had caused the violation.

12 XIV

13 Rose testified that the telephone conversations were of an unfriendly nature, and Hess
14 testified that Rose wouldn't provide the name of the person living at 22141 Place SE

15 PSAPCA did nothing further to identify the names residing at the residence and issued
16 no other violations pertaining to this residence.

17 XV

18 Rose contends that he did not cause or allow the fire because he does not control what
19 the renter does. Rose was at work at the time of the alleged incident.

20 XVI

21 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such
22 From these Findings of Fact, the Board issues these:

23 CONCLUSIONS OF LAW

24 I

25 The Board has jurisdiction over this issue and parties. Chapter 43 21B and

26 70 94 RCW

27 FINAL FINDINGS OF FACT.

CONCLUSIONS OF LAW AND ORDER

PCHB No 92-63

(4)

1
2 II

3 The Board takes official notice of PSAPCA's Regulation 1 which is on file with the
4 Environmental Hearings Office

5 III

6 PSAPCA's Regulation 1, Article 13, Section 13.03(a) reads that

7 It shall be unlawful for any person to cause or allow the emission of any air
8 contaminant from any solid fuel burning device for a period or periods aggregating
9 more than 3 minutes in any 1 hour, which is: (1) Darker in shade than that designated
10 as No. 1 (20% density) on the Ringleman Chart as published by the U.S. Bureau of
Mines; or (2) Of such opacity as to obscure an observer's view to a degree equal to or
greater than does smoke described in Subsection 13.03(a)(1)

11 There is no contention that the smoke was not in violation of Regulation 1, Article 13.
12 Section 13.03(a)(2) The contention is "who was responsible or in control of the smoking
13 chimney?"

14 IV

15 The Clean Air Act is a strict liability statute. Landowners are prima facie responsible
16 for the unlawful fires on their property. Landowners can, however, be absolved of
17 responsibility by showing that neither their actions nor their ownership are so connected with
18 the unlawful event as to have "caused, permitted, suffered, or allowed" it. PCHB 85-69

19 The Board has previously ruled that "landowners may rebut presumption of
20 responsibility for unlawful burning by showing lack of control" Sprague v SWAPCA,
21 PCHB No. 85-69 and Brandel Construction, Lessley Construction, et al v PSAPCA,
22 PCHB Nos. 85-136, 85-141, 85-154.

23 V

24 If a landowner cannot show "lack of control" he is normally held responsible for
25 unlawful fires started on his property. This, however, is not just because the landowner is the

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 92-63 (5)

1 only person to charge. It is rather because the landowner created a substantial risk of some
2 kind.

3
4 This case does not present circumstances that were created by the landowner. Although
5 he lives diagonally across the street, Rose was not on or near the premises at the time. He had
6 leased the property to Mills in 1988, and had a signed residential agreement. PSAPCA
7 charged Rose because they failed to obtain the name of the person or persons at the residence.

8 VI

9 Number five (5) of the Rental Agreement is titled Tenant's Obligations. Number Three
10 of the Tenant's Obligations states that the tenant is "to properly use and operate all electrical,
11 gas, heating, plumbing facilities, fixtures and appliances." The landowner is not responsible
12 under this clause and did not "cause", "permit", or "allow" the violation.

13 VII

14 Under "Use of Premises" the lease states that the Tenant shall not use said premises for
15 any purpose other than that of a residence . . . or any part thereof for any illegal purposes.
16 Tenant agrees to conform to municipal, county, and state codes, statutes, ordinances and
17 regulations concerning the use and occupation of said premises.

18 VIII

19 The question before the Board is whether the appellant was in "control" of the property
20 when a lawful agreement of responsibility of said premises was entered into.

21 IX

22 Appellant contends that he was not in control of the premises pursuant to RCW
23 59.18.130, Duties of tenant under the Landlord & Tenant Act. The Act states the following

- 24 (3) Properly use and operate all electrical, gas, heating, plumbing and other fixtures
25 and appliances supplied by the landlord;
26 (5) Not permit a nuisance or common waste; . . .

1 (8) Not engage in any activity at the rental premises that is.

2 (a) Imminently hazardous to the physical safety of other persons on the
3 premises;

4 X

5 We also note that the Landlord Tenant Act places certain duties on landlords
6 RCW 59.18.060(1) requires, for example, that the landlord:

7 maintain the premises to substantially comply with any applicable code, statute,
8 ordinance or regulation governing their maintenance or operation which the legislative
9 body enacting the applicable code, statute, ordinance or regulation and enforce as to the
premises rented if such condition substantially endangers or impairs the health or safety
of the tenant.

10 The evidence does not support a conclusion that Mr. Rose violated that section in this
11 instance.

12 XI

13 Based on the foregoing the Board concludes that the civil penalty of one hundred
14 dollars (\$100) should be dismissed in as much as the property in question was under lawful
15 lease with lessee responsibility clauses and the owner's actions or his ownership did not control
16 the unlawful event.

17 XII

18 Furthermore, the burden of proof lies with PSAPCA, and respondent entered no
19 evidence, either by testimony or exhibits, that Charles Rose was in control of the residence
20 where the violation occurred, and there is no evidence that the respondent made effort to learn
21 the identify of the person or persons in control of the smoking chimney or living at 22128
22 104th Place, South East. To the contrary, Inspector Pogers talked to the woman who came
23 out of the home for about ten minutes, but did not obtain her identity or that of any other
24 occupant

XIII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
From the foregoing, the Board issues this.

ORDER

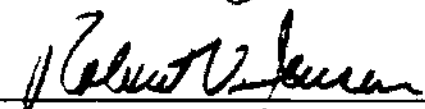
PSAPCA's Civil Penalty Order Number 7578 is DISMISSED.

DONE this 5th day of January, 1993.

POLLUTION CONTROL HEARINGS BOARD


ANNETTE S. MCGEE, Presiding


HAROLD S. ZIMMERMAN, Chairman


ROBERT V. JENSEN, Attorney Member

P92-63F